IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 656 OF 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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SMT. PREMILABEN PANKAJKUMAR ALIAS LADHARAM SHETHIA (THROUGH POWER OF ATTORNEY)- Petitioner(s)
Versus
STATE OF GUJARAT & ORS. - Respondent(s)

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Appearance :
MR. M.B. GANDHI for Petitioner(s).
MR. UDAY BHATT, AGP for Respondent(s) : 1.
NONE for Respondent(s) : 2 though served.
MR. C.H. VORA for Respondent(s) : 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 24/03/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Heard Mr.M.B.Gandhi, learned Counsel for the petitioner, Mr.Uday Bhatt, learned Assistant Government Pleader for the State and Mr. C. S. Vora, learned Counsel for

respondent No.3.

2. The facts necessary for disposal of the present petition are that in relation to certain tax recoveries, the property belonging to respondent No.2 were attached on 7th October, 1985 and thereafter, notices were issued to the defaulter, i.e. respondent No.2. The property, after its attachment, was put for auction and was purchased by respondent No.3. The present petitioner claiming himself to be a *bona fide* purchaser for value without notice filed his objections somewhere in December-1985 submitting, *inter alia*, that in the month of July-1985, an agreement was entered into between respondent No.2 and the petitioner for sale of the disputed property and thereafter, a document was reached somewhere in the first week of October-1985 and a Sale Deed was executed on 22nd October, 1985, that is, much before the notice could be served upon the present petitioner. After the objections were rejected, the petitioner filed a suit in the Court of the learned Civil Judge (S.D.), Bhuj-Kutch for declaration and injunction. An application for grant of *ad interim* injunction was also filed. The application was aptly contested by the Department and the trial Court rejected the said application. Being aggrieved by the said order, the present petitioner filed Appeal From Order No.270 of 1992 and also submitted Civil Application No.2099 of 1992. On 17th August, 1992, the learned Counsel for the said appellant/petitioner sought permission to withdraw the Appeal From Order in order to avail of the remedy, if any, available under the provisions of the Gujarat Sales Tax Act, 1969 (“the Act” for short). The Court accordingly

accorded the permission. As a consequence of the said permission, the appeal was dismissed and on the same day, Civil Application No.2099 of 1992 was also dismissed. Immediately thereafter, the petitioner went to the Department and made an application under Section-64 of the Act. Various contentions were raised before the said Authority, who after hearing the parties, came to the conclusion that it had no jurisdiction and the matter could be decided by the Civil Court only. It would be noteworthy that after withdrawal of the appeal, the petitioner, without reserving any right unto himself, had withdrawn the suit unconditionally. After his representation under Section-64 of the Act was rejected, he has filed the present Writ Application submitting, *inter alia*, that the respondent No.2 – Defaulter was in relation with respondent No.3, the auction purchaser, and these two persons have manipulated everything.

3. At the time of arguments, Mr.Gandhi firstly submitted that the Department was trying to blow hot and cold by raising different objections at different stages in different forums. He submitted that an objection was raised in the suit that the suit was not maintainable and the Court also so held, therefore, the petitioner had to go to the Department and the Department now says that it has no jurisdiction and the petitioner should go to the Civil Court.

4. Mr.Bhatt, learned Assistant Government Pleader for the State, submits that though the objections relating to the maintainability of the suit was raised by the State, but, no

issue was cast and without reserving any right, the petitioner had withdrawn the suit. He submits that in a matter like the present, where an inquiry is required to be made, the Civil Court would have been the proper forum in relation to the submissions made by the present petitioner.

5. Order XXIII, Rule-1 of the Code of Civil Procedure (“the Code” for short) relates to withdrawal of suit, etc. It says that in a given case with liberty to file a suit, if the suit is likely to be defeated because of formal defect or so, the suit can be allowed to be withdrawn with liberty to take appropriate action. It also says that in a given case, the plaintiff may give up part of his claim against all or some of the defendants. It also says that in case liberty is not reserved on the same cause of action, a subsequent suit would not be maintainable. In the present matter, the suit was withdrawn unconditionally, therefore, the provisions of Order XXIII, Rule-1 of the Code would apply with full force.

6. It was contended by Mr.Gandhi that during the course of arguments of the appeal in the High Court, it was observed by the Honourable Judge that the suit may not be maintainable and therefore, the Counsel was persuaded to withdraw the appeal. Unfortunately, this argument is based upon the perception of a person, who was present, and not on the strength of the proceedings recorded by the learned Judge, who allowed the petitioner's Counsel to withdraw the appeal. It is trite law that in a given case, if there are certain objections to the proceedings recorded by the Court, then, the endeavour of the party, challenging the correctness of the order, should

be to file an affidavit before the very same Judge that the proceedings recorded by him were incorrect or certain submissions could not be recorded. In absence of such an affidavit or challenge to the order passed by the learned Judge, it would always be presumed that the proceedings recorded by the learned Judge are absolutely correct and nobody was aggrieved by it.

7. It is also to be seen that the Order dated 17th August, 1992 is not a C.A.V. Order and, therefore, nobody can be allowed to say that the order was not passed in their presence. When the order is passed in presence of the Counsel and he does not raise any objection to the correctness of the statement made in the said order at the time when the said order is made, then, he would not be allowed to say that the order lacks any particulars or does not give fullest details.

8. In the records, it is also to be seen that the wife of the defaulter had submitted before the Authority that the present petitioner's husband was a money lender and to recover the money had entered into a bogus and sham transaction. The Officer, while dealing with this aspect, has observed that an old stamp was used to create a document in favour of the petitioner. He had also observed that the facts *prima facie* do not inspire confidence in the matter and the petitioner does not appear to be a *bona fide* purchaser for consideration without notice. The Officer has also observed that if the attachment was made much prior and the seller at least was knowing the fact, then, the seller should have informed the fact to the purchaser and in the present case, if the

petitioner wanted the Court to believe that he was a *bona fide* purchaser for consideration without notice, then, positive evidence ought to have been brought on the record. It would also be necessary for us to record that the disputed questions of facts cannot be enquired into by the High Court either under Article 226 or Article 227 of the Constitution of India. The petitioner had an opportunity to lead evidence either before the Civil Court or before the Tribunal, but, he had missed the bus on both the occasions.

9. Taking into consideration the facts, as those float on the surface of the record, and the legal position, we are of the considered opinion that the petition has no merits; it deserves to be and is accordingly dismissed, subject to costs of Rs.5,000/-. The petitioner has already made a deposit of Rs.28,000/- before this Court. A sum of Rs.23,000/- be refunded from the same to the petitioner and amount of Rs.5,000/- be adjusted towards costs. Rule is discharged.

10. After the judgement was concluded, Mr.Gandhi referred a judgement of Madhya Pradesh High Court in the matter of ***Hiralal vs. State of M.P. & Two Ors.***, [***1987 (67) STC 82***]. In the said matter, the Court observed that sum due under the notice of demand had already become payable on completion of assessment proceedings relating to the year 1968-69 and on the date of sale of the house, no proceeding could be said to be pending, for the purposes of section 33-A of the Madhya Pradesh General Sales Tax; and, therefore, the sale was valid.

The said judgement is on the language of Section 33-

A of the Madhya Pradesh Act. It is also contended that in the said judgement, it is observed by the High Court that if the attachment is subsequent to the sale, then, the sale, effected prior to the attachment, would not be void.

In the present case, the submission of the Department is that the attachment order was issued on 7th October, 1985 and undisputedly the sale was effected on 22nd October, 1985, which was much after the date of order of attachment. This judgement has no relevance in the matter.

[R.S.Garg, J.]

[Ravi R. Tripathi, J.]

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